Oct. 28

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1975

Number 75-1413

WAYNE A. STANTON, et al.,

Petitioners,

- VS -

LOUISE BOND, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS

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I.

INTRODUCTION

Respondents submit this Brief pursuant to Rule 41(5) of the Rules of the Supreme Court to bring to the attention of the Court newly enacted legislation not available when their Brief was filed. On October 19, 1976, President Ford signed into law "The Civil Rights Attorney's Fees Awards Act of 1976," Pub. L. No. 94-559 (Oct. 19, 1976),[1] which amends 42 U.S.C. § 1988 by adding the following:

> In any action or proceeding to enforce a provision of §§ 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

On its face the new Act obviously covers actions, such as this, brought under 42 U.S.C. § 1983 (Revised Statutes § 1979) and respondents therefore contend that it resolves the issue pending before this Court. The only possible questions are a) its application to cases pending before its effective date, and b) its effect on the petitioners' eleventh amendment claim. While the Act itself is silent on these two issues, respondents will demonstrate below that the legislative history makes it perfectly clear that the new Act is to apply to all pending cases and that it also contemplates awards of attorney fees against state governments.[2]

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1. The bill, S. 2278, passed in the Senate on September 29, 1976, 122 Cong. Rec. 17053 (daily ed. Sept. 29, 1976), and was brought up in the House by resolution. 122 Cong. Rec. 12150, 12156 (daily ed. Oct. 1, 1976). It passed in the House on October 1, 1976. 122 Cong. Rec. 12167 (daily ed. Oct. 1, 1976). Since S. 2278 is identical to H.R. 15460 reported out of the House Judiciary Committee on September 9, 1976, see 122 Cong. Rec. 12159 (daily ed. Oct. 1, 1976) statement of Mr. Drinan, the report of the House Judiciary Committee is relevant in interpreting this Act. H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976).

2. The language of the Act, providing for attorney fees "as part of the costs," also supports respondents' argument at pp. 4-9 of their Brief that attorney fees are analogous to costs which are not barred by the eleventh amendment.

II.

APPLICATION TO PENDING CASES

The general rule concerning a change in law during the pendency of an action was stated in the case of Bradley v. School Board of the City of Richmond, 416 U.S. 696, 94 S. Ct. 2006 (1974):

> . . . a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. (Emphasis added.)

Id. at 711. See also Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 281 (1969). In Bradley, this Court interpreted Thorpe as

> stand[ing] for the proposition that even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect.

416 U.S. at 715. Bradley involved an attorney fee issue and the court held that the 1972 amendment to section 718 of the Emergency School Aid Act (20 U.S.C. § 1617) providing for attorney fees was to be applied to the case before the court even though the legislative history of § 718 did not explicitly indicate it applied to pending cases, 416 U.S. at 716, and the case had been initiated long before the amendment to the Emergency School Aid Act.

The intent of Congress concerning the application of the new attorney fee act to pending cases was expressed on several occasions during the consideration of this bill. In the Senate on September 29, 1976, Senator Abourezk made the following statement:

> The Civil Rights Attorneys' Fees Awards Act authorizes Federal courts to award attorneys' fees to a prevailing party in suits presently pending in the Federal courts. The application of this Act to pending cases is in conformity with the unanimous decision of the Supreme Court in Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974).
>
> This application is necessary to fill the gap created by the Alyeska decision and thus avoid the inequitable situation of an award of attorneys' fees turning on the date the litigation was commenced.
>
> It will also result in a significant saving of judicial resources. At present, due to the Alyeska decision, a court must analyze a party's actions to determine bad faith in order to award attorneys' fees. This is a complex, time consuming process often requiring an extensive evidentiary hearing. The enactment of this legislation will make such an evidentiary hearing unnecessary in the many civil rights cases presently pending in the Federal Courts.

122 Cong. Rec. 17052 (daily ed. Sept. 29, 1976). On the same date Senator Kennedy made reference to this case in giving examples of cases that would be covered by the new act. He stated:

> In a case now pending, officials accepted Social Security Act funds for years for certain medical screening programs when in fact they had no such programs in most of the State.

Id.[3]

In the House, the same intention was manifested. Beginning with the House Report, it was stated:

> In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. Bradley v. Richmond School Board, 416 U.S. 696 (1974).

3. Representative Drinan, the author of the House bill, specifically pointed out that the act provides for attorneys' fees in "suits against State and local officials based upon Federal statutory as well as constitutional rights. For example, Blue against Craig, 505 F.2d 830 (4th Cir. 1974)." 122 Cong. Rec. 12159 (daily ed. Oct. 1, 1976); see also Statement of Senator Abourezk, 122 Cong. Rec. 17053 (daily ed. Sept. 29, 1976).

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess 4 n.6 (1976). On the floor, Representative Anderson from Illinois stated:

> . . . it would apply to cases now pending, for the simple reason that if that were not the case, the award of fees would depend on the date that the case is filed. I do not think that is the basis on which a determination is made. To that extent, it is retroactive. Pending cases could receive an award of reasonable fees.

122 Cong. Rec. 12155 (daily ed. Oct. 1, 1976). On the same date, Representative Drinan made the following statement:

> I should add also that, as the gentleman from Illinois (Mr. Anderson) observed during consideration of the resolution on S. 2278, this bill would apply to cases pending on the date of enactment. It is the settled rule that a change in statutory law is to be applied to cases in litigation. In Bradley versus Richmond School Board, the Supreme Court expressly applied that long-standing rule to an attorney fee provision, including the award of fees for services rendered prior to the effective date of the statute.

Id. at 12160. Finally, on October 1, 1976, an amendment proposed by Representative Ashbrook which would have expressly limited the new act to cases filed after its effective date was soundly defeated. Id. at 12166.

Therefore, it is quite apparent from the legislative history in both the Senate and House that the new act was to have retroactive application in accordance with the decision of this Court in Bradley v. School Board of the City of Richmond, supra. The sole issue presented in this case, whether the eleventh amendment bars the award of attorney fees, must be considered in light of the new act.

III.

NEW ACT ELIMINATES ELEVENTH AMENDMENT DEFENSE

Last term in Fitzpatrick v. Bitzer, __U.S.__, 96 S. Ct. 2666 (1976), this Court held that both back-pay and attorney fees could be awarded to a successful plaintiff in an action against a state under Title VII of the Civil Rights Act of 1964, as amended in 1972. In considering the eleventh amendment, the Court noted that Title VII had been passed pursuant to the power granted Congress under § 5 of the fourteenth amendment and stated:

> But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see Hans v. Louisiana, 134 U.S. 1 (1890), are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. . . . When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are unconditionally impermissible in other contexts. (footnote omitted) (emphasis added).

Id. at 2671.

Remarks in both the Senate and House indicate that Pub. L. No. 94-559 was also passed pursuant to § 5 of the fourteenth amendment, and § 2 of the thirteenth amendment. In the Senate, Senator Abourezk stated, "[i]n enacting this legislation we are acting pursuant to § 2 of the thirteenth amendment and § 5 of the fourteenth amendment." 122 Cong. Rec. 17052-053 (daily ed. Sept. 29, 1976). On the House floor, Representative Drinan made the same reference to the source of congressional power after referring to Bitzer.

> The question has been raised whether allowing fees against State governments in suits properly brought under the covered statutes would violate the 11th amendment. That

> amendment limits the power of the Federal courts to entertain actions against a State. This issue is no longer seriously in dispute after the recent Supreme Court decision in Fitzpatrick against Bitzer. Since this bill is enacted pursuant to the power of Congress under § 2 of the 13th amendment and § 5 of the 14th amendment, any question arising under the 11th amendment is resolved in favor of awarding fees against State defendants.

122 Cong. Rec. 12160 (daily ed. Oct. 1, 1976).

The House Committee on the Judiciary also referred to Bitzer. After indicating that government resources provide "an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities," H.R. Rep. No. 94-1558, 94th Cong. 2d Sess. 7 (1976), it was stated in a footnote: "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. Fitzpatrick v. Bitzer, __U.S.__, 96 S. Ct. 2666 (June 28, 1976)." Id. at n.14. This same intention is evident in the Report of the Senate Committee on the Judiciary:

> Fee awards are therefore provided in cases covered by S. 2278 in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5. As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, (footnote omitted) will be collected either directly from the official, in his official capacity (footnote omitted) from funds of his agency or under his control, or from the state or local government (whether or not the agency or government is a named party).

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976). On the Senate floor, an opponent of the bill, Senator Helms, recognized that the

bill would cover state and local government officials and proposed an amendment to exempt them.

> This legislation provides that State and local governments and their officials can be defendants in cases involving these statutes, and that attorneys' fees will "be collected either directly from the official in his official capacity, from funds of his agency or under his control, or from the State or local government." Presently this legislation potentially places a tremendous burden upon State and local governments. In other public interest law suits where the legal fees have been contested they have ranged from $200,000 to $800,000. Certainly, it is unwise to provide that liability in these amounts be assumed by already financially hard-pressed State and local governments.
>
> Therefore, the amendment I am about to call up would exempt State and local governments from the provisions of S.2278, or the Kennedy substitute.

122 Cong. Rec. 16432 (daily ed. Sept. 22, 1976). The amendment to exempt state and local governments was proposed and tabled. Id. at 16433-434. Finally, another obvious recognition that the new act will apply to actions against state officials is found in the House Report. After discussing the fact that various immunity doctrines often preclude an award of damages against public officials, it is stated:

> Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.

H.R. Rep. No. 94-1558, 94th Cong. 2d Sess. 9 (1976).

Thus, the congressional intent concerning suits against state officials and the eleventh amendment could not be more clear. In

acting under §5 of the fourteenth amendment to provide attorneys' fees in §1983 cases, Congress attempted to assure that all persons equally would have the capacity to utilize §1983 to secure protection of the rights due them under federal law. There can be no doubt but that this new legislation governs the eleventh amendment issue in this case and precludes it as a defense of the state officials.

IV.

CONCLUSION

Based on Bradley, supra, and the express intent of Congress as outlined above, this Court must apply the provisions of Pub. L. No. 94-559 to this case. Having established this, the legislative history of the act and the decision in Bitzer, supra, dictate that the eleventh amendment defense raised by the state officials be rejected and that the decision of the lower court be affirmed.

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